BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

CORTEZ WHITMORE	)	
Claimant	)	
VS.	)	
	)	
R & R CONTRACTING	)	
Respondent	)	Docket No. 1,057,916
AND	)	
	)	
TRAVELERS CASUALTY & SURETY	)	
Insurance Carrier	)	

ORDER

Claimant appealed the September 21, 2012, Award entered by Administrative Law Judge (ALJ) Thomas Klein. The Board heard oral argument on May 24, 2013, in Wichita, Kansas.

APPEARANCES

Scott J. Mann of Hutchinson, Kansas, appeared for claimant. Dallas L. Rakestraw of Wichita, Kansas, appeared for respondent and its insurance carrier (respondent).

RECORD AND STIPULATIONS

The record considered by the Board and the parties' stipulations are listed in the Award.

ISSUES

This is a claim for a July 7, 2011, accident in which claimant was punched by a co-worker. In the September 21, 2012, Award, ALJ Klein denied claimant compensation as claimant failed to prove his injury arose out of and in the course of his employment.

Claimant contends he sustained personal injury by accident arising out of and in the course of his employment when a co-worker struck him, breaking his jaw. Claimant requests temporary total disability benefits and permanent partial disability benefits based upon a 5% whole body functional impairment. Claimant submits his average weekly wage

is $756.00. At the regular hearing, claimant claimed reimbursement of medical expenses and unauthorized medical benefits. Finally, claimant requests future medical benefits.

Respondent requests the Board affirm the Award and maintains claimant failed to prove he sustained an injury arising out of and in the course of his employment. Respondent argues the assault by the co-worker was not due to the nature, conditions, obligations or incidents of claimant's employment and that claimant did not offer any evidence indicating respondent should have foreseen the assault.

The issues before the Board on this appeal are:

1. Did claimant sustain a personal injury by accident arising out of and in the course of his employment with respondent?

2. Did claimant voluntarily engage in fighting and, therefore, compensation is disallowed by K.S.A. 2011 Supp. 44-501(a)(1)(E)?

3. If claimant proves he sustained a personal injury by accident arising out of and in the course of his employment with respondent:

A. What is claimant's average weekly wage?

B. What, if any, temporary total disability benefits is claimant entitled to receive?

C. What is the nature and extent of claimant's disability?

D. What medical benefits is claimant entitled to receive, including future and unauthorized medical?

FINDINGS OF FACT

After reviewing the entire record and considering the parties' arguments, the Board finds:

Claimant's original Application for Hearing indicated that he broke his jaw when struck by a co-worker on July 8, 2011. Claimant later amended the date of the incident to July 7, 2011.

In April 2011, claimant was hired by his supervisor, Frank Bohannon, Sr. (Frank), to work for respondent. Claimant constructed railroad tracks for respondent. Claimant resides in Arkansas, but worked for respondent in several locations, including Hutchinson, Kansas. Claimant would work three weeks in a row and then be off work three days. During the three-week work period, claimant would work from 7 a.m. to 5:30 p.m. with a

30-minute lunch break. Claimant relied on Frank for transportation from Arkansas to Hutchinson and while working in Hutchinson. According to claimant, Frank, Juan Reed, Dwayne Bohannon, Odis Wilson, Devacchio Gaddie and an individual nicknamed "Scooby" were on claimant's crew.

Claimant testified that on July 7, 2011, he ate his lunch at the job site between 12:00 p.m. and 12:30 p.m. After returning to work, the crew members were getting tools to pull spikes. As they were standing around, the crew members spoke about a recent raise they received from $9 to $12 per hour and the cost of traveling to Hutchinson from Arkansas. Claimant and Mr. Reed were talking about saving their money and purchasing an automobile. Another conversation arose and Mr. Wilson spoke to claimant about a cousin of claimant's cousin, whom Mr. Wilson used to date. Claimant testified what happened next:

> So Delveccio *[sic]* [Gaddie] came in the picture, he put his two words in. And so I left from the conversation.
>
> As I was walking off, that's when he hit me. And when he hit me, I couldn't see nothing. He knocked me to the ground. Like, when he hit me, I couldn't see nothing. . . .[1]

Claimant further testified:

> And I don't know what he hit me for, that's what I been wondering, what he hit me for. And I ain't said two words to him. I didn't say nothing to him. I didn't put my hands on him, I ain't did nothing to this man. Even after he hit me, I didn't do nothing to him, I just -- I tried to tell Frank, Frank didn't want to hear it.[2]

Claimant testified that immediately before the incident he had not had any discussions with Mr. Gaddie and that before being hit he did not hang out with Mr. Gaddie at lunch or after work. According to claimant, Frank, Mr. Gaddie, Mr. Wilson, Mr. Reed and Dwayne Bohannon were present when claimant was hit. Claimant indicated the crew members were all in "one little area"[3] and were laughing after the incident occurred. Claimant testified Frank saw the punch. After the incident, claimant approached Frank and asked to go to a hospital because something felt broken. Frank told claimant if he went to the hospital he would be fired. Claimant testified he did not ask or have any conversations with Mr. Gaddie to find out why he hit claimant. Claimant testified that he

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[1] Claimant Depo. at 27.

[2] *Id.* at 34.

[3] *Id.* at 48.

spoke to the other crew members about why Mr. Gaddie hit him, but no one knew why. Claimant worked the rest of the day and the next day.

On July 9, 2011, Frank took claimant to the hospital where x-rays revealed claimant had a broken jaw. Claimant testified his jaw was surgically repaired before he returned to Arkansas on July 14, 2011. Claimant testified he was treated only by Dr. Bradley Wright, but the record includes a bill from Dr. W. R. Whitlow.[4] Claimant remained in Hutchinson, off work, from July 9 until July 14, when he returned to Arkansas with Frank. Claimant later returned to Hutchinson to see Dr. Wright, who released claimant to return to work six weeks after his surgery. Claimant indicated he was discharged by respondent for missing too much work. Claimant has not worked elsewhere since the incident. He applied for unemployment benefits, but was denied benefits without an explanation.

James Darnell Scott, Jr.,[5] testified he was a member of Frank's crew on July 7, 2011, but did not see the incident between claimant and Mr. Gaddie. Mr. Scott found out about the incident a couple of days later, but made little attempt to find out why it took place. He figured claimant said something that Mr. Gaddie did not like. Mr. Scott indicated that he was later told the incident occurred during lunch break. Mr. Scott went to lunch off-site and did not go with claimant. Mr. Scott assumed the incident occurred while he was at lunch and could not recall the date of the incident. Mr. Scott indicated Frank's crew was split up on the day the incident took place and that Frank was supervising both groups, which were about 100 to 150 yards apart. Mr. Scott stated Mr. Wilson and Dwayne Bohannon were with his group and claimant and Mr. Gaddie were with the other group.

Mr. Wilson testified that he did not see or know about the incident between claimant and Mr. Gaddie. Mr. Wilson was told by claimant that he injured his jaw while wrestling with a brother. If a fight had occurred during work hours and not on lunch break, Mr. Wilson would have seen it. However, Mr. Wilson indicated that at times the crew was separated into two groups working 100 yards away from each other.

Frank testified he was hired as superintendent, but was considered a foreman and supervised the crew of claimant, Mr. Gaddie, Dwayne Bohannon, Mr. Reed, Mr. Scott and Mr. Wilson. He knew of no disagreements, fights or altercations between claimant and Mr. Gaddie prior to July 7, 2011. On the day of the incident, during his lunch break, right before everyone was to return to work, Frank was approached by claimant, who reported being struck by Mr. Gaddie. Frank testified that claimant and Mr. Gaddie went to a convenience store in Mr. Gaddie's vehicle to purchase lunch. Although he did not see the incident, Frank understood it occurred during lunch break. Frank testified he always took

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[4] Brown Depo., Ex. 3.

[5] The record does not indicate if Mr. Scott and "Scooby" are one and the same. Claimant identified "Scooby" as Frank's grandson.

his lunch on the job site. On cross-examination, Frank indicated he could not truthfully say the incident took place off the job site or who had left the job site to go to the convenience store.

After claimant reported the incident to him, Frank spoke to claimant and Mr. Gaddie about what occurred. Neither claimant nor Mr. Gaddie would elaborate on what happened and Frank never found out what the incident was about. Frank denied telling claimant that if he went to the hospital, he would be fired. Claimant was terminated because he did not show for work after they "came back off another tour."[6] Frank testified he would have found light duty for claimant to perform during the time his jaw was wired shut.

At the request of his attorney, claimant was evaluated by Dr. C. Reiff Brown on September 16, 2011. Claimant reported to Dr. Brown of being struck in the face by a fellow worker with his elbow. According to Dr. Brown, claimant fractured the right side of his mandible. Using the *Guides*,[7] Dr. Brown opined that claimant sustained a 5% functional impairment to the body as a whole. Dr. Brown opined claimant would be temporarily totally disabled for two weeks after the incident and could have returned to work on July 21, 2011. Claimant would then have temporary restrictions for two to three weeks thereafter. He opined claimant's medical treatment was reasonable and necessary to cure the effects of the fractured jaw. Dr. Brown placed no permanent restrictions upon claimant. At Dr. Brown's deposition, claimant introduced medical bills in the amount of $19,752.75.

ALJ Klein determined that claimant failed to prove he sustained a personal injury by accident arising out of and in the course of his employment with respondent, stating:

> An injury by assault is compensable when it arises out of the nature, conditions, obligations and incidents of the employment. Springston v. IML Freight 704 P2d *[sic]* 394. The court concludes under the circumstances presented that if it can conclude that the assault was caused by a disagreement about the number of weeks the men were going to work in Kansas, then his injury could be said to arise out of and in the course of his employment. If the disagreement was about the claimant's cousin, the incident is clearly not an incident of employment and is not compensable. The court has no evidence before it about the nature of the incident, nor can it divine any from the record. The claimant testified that he did not know why the assault took place. He therefore has failed to prove that his injury arose out of and in the course of his employment and his claim must be denied.[8]

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[6] Bohannon Depo. at 21.

[7] American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

[8] ALJ Award at 3.

PRINCIPLES OF LAW AND ANALYSIS

The Workers Compensation Act places the burden of proof upon the claimant to establish the right to an award of compensation and to prove the conditions on which that right depends.[9] "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record unless a higher burden of proof is specifically required by this act."[10]

K.S.A. 2011 Supp. 44-501(a)(1)(E) provides that compensation for an injury shall be disallowed if such injury results from "the employee's voluntary participation in fighting or horseplay with a co-employee for any reason, work related or otherwise."

The evidence clearly shows that claimant was struck without warning by Mr. Gaddie. There was no argument between claimant and Mr. Gaddie prior to the assault. Nor had claimant or any other members of the crew engaged in horseplay before claimant was struck. Therefore, the Board finds that claimant did not voluntarily engage in fighting.

The two phrases arising "out of" and "in the course of" employment, as used in the Kansas Workers Compensation Act, have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable.

> The phrase 'out of' employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises 'out of' employment when there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury. Thus, an injury arises 'out of' employment if it arises out of the nature, conditions, obligations, and incidents of the employment. The phrase 'in the course of' employment relates to the time, place, and circumstances under which the accident occurred and means the injury happened while the worker was at work in the employer's service.[11]

Respondent argues claimant's accident occurred on his lunch break and, therefore, did not occur in the course of claimant's employment with respondent. Claimant testified the incident occurred after lunch, on the job site as the crew members were gathering tools necessary for work. The other witnesses, Mr. Scott, Mr. Wilson and Frank, did not see the incident. Mr. Wilson and Mr. Scott did not learn of the incident until some time later.

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[9] K.S.A. 2011 Supp. 44-501b(c).

[10] K.S.A. 2011 Supp. 44-508(h).

[11] *Kindel v. Ferco Rental, Inc.*, 258 Kan. 272, 899 P.2d 1058 (1995).

Therefore, the testimony of Frank, Mr. Scott and Mr. Wilson sheds little light on whether the incident occurred during working hours. Claimant is the only eyewitness who testified and indicated the assault took place during work hours. Therefore, the Board finds that claimant sustained a personal injury in the course of his employment with respondent.

The crux of this claim is whether claimant's injury by accident arose out of his employment. Both parties cited Kansas appellate cases in support of their positions. In his Award, ALJ Klein cited *Springston*,[12] wherein claimant got into an argument with a co-worker over who had the right to drive a particular truck and they scuffled. After separating, claimant was struck from behind and he could not identify the assailant. The Kansas Court of Appeals stated, "Since we have already concluded that there was evidence in this case indicating that both the scuffle and the injury arose out of a disagreement over the conditions and incidents of the job, the finding that the injury arose out of the claimant's employment must be affirmed."[13]

In *Harris*,[14] claimant worked as a dietary aide for respondent. Douglas Kirkwood also worked for respondent as a cook. While claimant was waiting for an elevator as she was taking a food tray to a patient, Kirkwood approached claimant and, without provocation, struck her in the face. Claimant testified that prior to this incident, she had experienced problems with Kirkwood and had reported them to her supervisors. Claimant also testified that the prior problems consisted mostly of name calling, but that on one occasion Kirkwood spilled hot soup on her. According to claimant, when her supervisors did nothing to stop Kirkwood's behavior, she filed a police report against him. The Administrative Law Judge in that case awarded claimant compensation. The Board reversed the award. The Kansas Court of Appeals reversed and remanded the case to the Board, directing that the Board determine whether respondent had reason to anticipate that Kirkwood might become violent and that injury might result to claimant if she and Kirkwood continued to work together. The Kansas Court of Appeals stated:

> Here, there was an incident that occurred "from reasons purely personal to the participants." As the Board said, however, claimant's injuries did not result from personal arguments "imported" from outside work into the workplace. Rather, this personal dispute "arose from the association between the claimant and co-worker at work."

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[12] *Springston v. IML Freight, Inc.*, 10 Kan. App. 2d 501, 704 P.2d 394, *rev. denied* 238 Kan. 878 (1985).

[13] *Id.* at 506-507.

[14] *Harris v. Bethany Medical Center*, 21 Kan. App. 2d 804, 909 P.2d 657 (1995).

> In this case, we do not have a claimant who "stepped aside from [her] work and left [her] task." Rather, we have a claimant who was engaged in her work and her task when she was unexpectedly assaulted by a co-employee.[15]

Perhaps the most extensive discussion of workplace assaults and their compensability was in *Brannum*.[16] In *Brannum,* an employee, Gary Coltharp, whom claimant supervised at a golf course, refused to mow. Claimant told Coltharp to mow or go home. Coltharp then indicated he was going home, but wanted his paycheck. Claimant indicated he could not provide the paycheck as it needed two signatures. Coltharp indicated he would return that afternoon and he wanted claimant to have the paycheck ready. When Coltharp returned, the paycheck was not ready. Coltharp then shot a pistol at claimant, striking him several times. Coltharp had not had any arguments or difficulties with claimant prior to the incident in question. The district court found claimant's injuries did not arise out of and in the course of his employment. The Kansas Supreme Court reversed and remanded, stating:

> Upon numerous occasions this court has considered the phrase 'out of' the employment (5 Hatcher's Kansas Digest, rev. ed., Workmen's Compensation, §§ 21-22; 9C West's Digest, Workmen's Compensation, §§ 604-613) and has consistently stated it points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment; that an injury arises 'out of' the employment when there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury; that an injury arises 'out of' the employment if it arises out of the nature, conditions, obligations and incidents of the employment (*Siebert v. Hoch*, supra, Syl. ¶¶ 3, 4).[17]

The actions of Mr. Gaddie were not foreseeable. Claimant did not indicate that he had any prior issues with Mr. Gaddie. Frank was unaware of any disagreements between Mr. Gaddie and claimant. According to *Brannum* and *Jordan*,[18] if the actions of the employee committing the assault are unforeseeable by the employer, the assaulted worker must prove there was a causal connection between his employment and the dispute leading to the assault.

Claimant testified that he did not know why he was struck by Mr. Gaddie. Shortly before the assault, the crew spoke about a cousin of claimant's cousin and the cost of traveling to Hutchinson to work. Claimant and Mr. Reed also spoke about purchasing an

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[15] *Id.* at 809.

[16] *Brannum v. Spring Lakes Country Club, Inc.*, 203 Kan. 658, 455 P.2d 546 (1969).

[17] *Id.* at 665-666.

[18] *Jordan v. Pyle, Inc.*, 33 Kan. App. 2d 258, 101 P.3d 239 (2004), *rev. denied* 279 Kan. 1006 (2005).

automobile. None of those conversations concerned claimant's employment or work activities. Accordingly, the Board finds claimant failed to prove the assault arose out of his employment with respondent.

CONCLUSION

1. Claimant did not voluntarily engage in fighting.

2. Claimant failed to prove that his personal injury by accident arose out of his employment with respondent.

3. The issues of claimant's average weekly wage, temporary total disability benefits, the nature and extent of claimant's disability, and medical benefits are moot.

As required by the Workers Compensation Act, all five members of the Board have considered the evidence and issues presented in this appeal.[19] Accordingly, the findings and conclusions set forth above reflect the majority's decision and the signatures below attest that this decision is that of the majority.

AWARD

WHEREFORE, the Board affirms the September 21, 2012, Award entered by ALJ Klein.

IT IS SO ORDERED.

Dated this ____ day of July, 2013.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

[19] K.S.A. 2012 Supp. 44-555c(k).

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